No. 86-704

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S APPENDIX, PART I

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C2-84-1661

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Plaintiff,

vs.

ORVILLE BERNDT, JR.,

Defendant.

APPELLANT'S BRIEF AND APPENDIX

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TRIAL COURT HELD: IN THE NEGATIVE

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TRIAL COURT HELD: IN THE NEGATIVE

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WAS THE EVIDENCE SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE?

TRIAL COURT HELD: IN THE AFFIRMATIVE

PROCEDURAL HISTORY

August 21, 1981	At 2:56 a.m., police and fire fighters respond to a fire at Skip Berndt's home.
August 21, 1981	At 7:00 a.m., Skip Berndt questioned by police at the Brooklyn Center Police Department.
August 27, 1981	Skip Berndt interviewed at Brooklyn Center Police Station.
October 6, 1981	Skip Berndt questioned by police; told case with Hennein County Attorney and would be charged.
August 17, 1982	Hennepin County Attorney presented its case against Skip Berndt to a Hennepin County Grand Jury.
August 17, 1982	Skip Berndt was indicted on eight counts of First Degree Murder.
August 18, 1982	Skip Berndt was arrested.

August 19, 1982	Skip Berndt made his first appearance in court. Bail was set at $150,000 by the Honorable Chester Durda.
September 2, 1982	Bail reduced to $35,000 by the Honorable Chester Durda.
September 3, 1982	Skip Berndt posted $35,000 bond.
November 10, 1982	Skip Berndt moved the Court to dismiss the indictment filed against him.
November 22, 1982	Motion to dismiss was denied by the Honorable Eugene Minenko.
March 4, 1983	The Honorable Doris Huspeni assigned to case.
October 3, 1983	Trial begins.
October 5, 1983	Court denies motions to suppress.
November 12, 1983	Skip Berndt was found guilty of eight counts of First Degree Murder.

November 12, 1983	The Honorable Doris Huspeni sentenced Skip Berndt to life imprisonment on four counts of First Degree Murder. The Court ordered the sentences served concurrently. The Court did not sentence on the remaining four counts pursuant to Minn. Stat. §609.035.
November 22, 1983	Skip Berndt moved the Court for a new trial or judgment of acquittal because the State had not complied with the Discovery Requirements of Rule 9, Minnesota Rules of Criminal Procedure.
March 21, 1984	Testimony was taken pursuant to Skip Berndt's New Trial Motion.
August 1, 1984	The Honorable Doris Huspeni denied Skip Berndt's Motion for New Trial or Judgement of Acquittal.
September 13, 1984	Notice of Appeal to the Supreme Court of the State of Minnesota filed.

STATEMENT OF FACTS

On August 20, 1981, Skip Berndt returned home from work at approximately 6:00 p.m. (T. 1119). He worked at Continental Baking Company as a sales supervisor (T. 1109). As Skip changed his clothes, his wife Brenda cooked a pizza for the children for supper. Because the smoke alarms in the townhouse complex were overly sensitive and the exhaust ventilation was very poor, the residents frequently disconnected them when using the ovens (T. 282). Skip did this (T. 1119).

Skip and Brenda then left to meet with their automobile insurance carrier so that a used car they had recently purchased could be properly insured (T. 1120). After taking care of the insurance, Brenda and Skip had a night out with friends to celebrate the car

purchase. After visiting two bars, Brenda and Skip ended up at the Earle Brown Bowl in Brooklyn Center which was usual for them because they knew many people there. They arrived about 10:30 p.m. and stayed until 1:00 a.m. While there, they drank and visited (T. 1121-1124). Everyone described Skip and Brenda as having a good time and saw no problems, difficulties, fights, etc. (T. 636, 646, 649, 660, 678, 953).

They left the Earle Brown Bowl together and arrived home about 1:10 a.m. (T. 1124). Skip hadn't eaten supper that evening so he went into the kitchen and fixed something to eat (T. 1125). He laid down on the couch and watched television (T. 1126). Skip fell asleep (T. 1128), he woke up, he wasn't sure if it was Brenda who woke him up or something else (T. 1130, 1131), but he saw flames by the dining room window

(T. 1130). At this time, the house was full of smoke and extremely hot. Skip was confused and panicked. He saw Brenda heading towards the kitchen area and he ran out the "front door" (T. 1130). As he left his home, the house burst into flames (T. 1132).

As Skip came out the front door, his next-door neighbor, Charles Catron, came out his door (T. 255). Skip started screaming for the fire department (T. 1135). Mr. Catron had come out because his wife woke him and told him of the fire next door (T. 242). Mr. Catron crawled into Skip's house, over an area the State contended gasoline was present (T. 548), and got into the kitchen. He saw Brenda's feet but could not see the rest of her because the smoke was so heavy. He burned his finger on the metal strip that held the carpet down at the

line between the dining room and kitchen (T. 257-260) (See Appendix A).

When the police arrived, Skip was trying to put the fire out by using a garden hose (T. 62-63). Officer Robert Adams of the Brooklyn Center Police Department was the first on the scene. He reported that the second story of the home was not afire (T. 61, 82). Consequently, he spent some time looking for a ladder, including kicking in a door to the caretaker's maintenance equipment garage, to rescue anyone upstairs (T. 63). He found no ladder. Officer Adams kept calling the fire department to tell them how serious the fire was (T. 61-62). The fire department arrived. Fire personnel said they arrived five to six minutes after they were notified (T. 91). However, the neighbors who reported the fire said that the fire fighters did not arrive until ten to twenty minutes after

the fire was discovered (T. 229, 283). Roxanne Berg, one of the neighbors present at the scene, specifically disputed the five minutes the fire department claimed it took them to arrive (T. 229). As a result of her criticism, Fire Marshall Jerry Pedlar accused Ms. Berg of making the fire department look bad (T. 231, 232). The fire was under control approximately 35 minutes after the fire fighters started fighting the fire (O.H.T. 46, T. 728).

Because of Skip's hysteria and his interference with the fire fighters, Officer Adams took Skip to Skip's sister's home in Maple Grove. In the car ride, Officer Adams detected no odor of gasoline (T. 77). While Skip was outside watching his home burn, a neighbor hugged him. She detected no odor of gasoline (T. 251). Officer Adams was later instructed to bring Skip Berndt back to

the Brooklyn Center Police Department for interrogation. Officer Adams was instructed that Berndt had no choice to refuse and that he was to be treated as a suspect (O.H.T. 16, 101). The Brooklyn Center Fire Marshall considered the fire an arson because of how much of the home was burning when the fire department arrived (T. 719).

Skip told the officers what happened that evening (T. 115-118). In the interview, Skip was wearing the same clothes he had on while at the scene (T. 969). The left side of his arms and face were singed (T. 1054). However, no one detected the odor of gasoline (T. 1055). Skip Berndt's clothes were not confiscated (T. 347). Skip was requested to and did consent to being taken to North Memorial Medical Center to draw blood for purposes of evaluating the alochol content (T. 118-119). Brenda

Berndt, age 31, Richard Gage, age 14, Michael Gage, age 10, and Corey Berndt, age 4, died in the fire.

The arson investigators evaluated the scene for four days over a one-month time period. They immediately assumed that the fire to Skip's house was an arson, because so much of the house was on fire when they arrived. They referred to it as "rapid acceleration" (T. 719, 729). They also did not believe Skip could get out of his home in the manner he testified (T. 753). In searching the home, the investigators found low burn areas and trailerings which they believed indicated a "set fire" (T. 776). They cut out 26 samples they considered suspicious and sent them to the federal laboratory of the Alcohol, Tobacco, and Firearms division in Rockville, Maryland. The chemist analyzed the samples by means

of gas chromatography. He said he used the Purge and Trap method of analysis (T. 2158) (See Appendix D). Of the 26 suspicious samples he tested, he believed gasoline was present in only 5 (T. 546, 548, 549, 550, 551).

The defense demanded production of the "positive chromatograms", i.e., the chromatograms of the five samples the expert believed contained gasoline. The defense was provided five chromatograms, one for each sample. Throughout trial, the State's expert testified, and everyone assumed, that all of the positive chromatograms the State's expert ran were provided to defense counsel (T. 556, 1867, 1868). At the conclusion of the trial, the defense learned for the first time that the State's expert had run multiple tests on the same samples, had not provided the resulting chromatograms to the defense, and had

those in his laboratory in Maryland (T. 2161; M.T. 30).

At trial, the defense called two experts. Robert Davis, a forensic chemist and analytical chemist who does research work for the petroleum industry and has had over 25 years experience working with the gas chromatograph and gasoline (T. 1673-1677). He reviewed the five chromatograms submitted by the State's expert and concluded that they did not show the presence of gasoline. Rather, the chromatograms showed the presence of household hydrocarbons which appear within the gasoline spectrum (T. 1810, 1817, 1819, 1823, 1830).

The State's theory at trial was that Skip got drunk that evening, fought with his wife, poured five gallons of gasoline (T. 930) throughout his house, and lit it so he could be free of his family (T. 2257). To that end and over

counsel's objection, the State was allowed to introduce atempts at sexual advances made by Skip to other women, some even before his marriage to Brenda (T. 601, 636, 659). However, no evidence was presented that Brenda and Skip even argued that evening, let alone fought; no evidence was presented as to where the supposed five gallons of gasoline came from. The State also inferred that had Skip been innocent, he would not have run out of his house (T. 2225). However, no evidence on reaction to a panic situation was presented to the jury.

The State also theorized that Skip killed his family for profit. However, the State introduced no evidence that Skip knew what the financial results of a death to his wife would be. His wife worked for the State of Minnesota and was provided $15,000 double indemnity insurance on her life. There was no

evidence Skip knew of the existence of the insurance policy. A beneficiary was not even named in the policy (T. 706) and the policy had been in force since 1978 (T. 707). The State also showed that when Skip and Brenda purchased their used car, it was financed through Community Credit which added a credit-life policy to the loan. The State's position was that this was another economic incentive for Skip to murder his wife. However, this was the normal business transaction Skip and Brenda did with that institution (T. 691), on loans in 1977, 1978, 1979, 1980 (T. 695). This evidence was presented by the defense, not the State. Skip was not even aware that the car loan was paid off with Brenda's death (T. 1244, 1254).

The evidence also presented by the defense showed that Skip had a loving father-son relationship with the three

boys. Even though Richard and Michael were not his biological children, he treated them as his own. He coached them in little league baseball, spent time with them, and acted as an ordinary family (T. 1114). Corey, Skip and Brenda's child, was inseparable from Skip. He was constantly with his dad even to the point of insisting he be allowed to sit on Skip's lap at the dinner table of family get togethers (T. 1255). There was no evidence presented as to why Skip would want to kill his children even though the State's expert found gasoline in two of the boys bedroom (T. 551). In final argument, the State contended that Skip put the gasoline there to trap his sons in the bedroom so they could not escape.

The experts testified that a gasoline fire exhibits instantaneous combustion throughout the structure which

was consistent with the State's position given the total involvement of the house in such a short time (T. 717, 935). Such a fire produces little smoke but great heat. However, carbon monoxide caused the children's death. The levels were very high, which indicated they did not die from breathing superheated air, but from breathing during a smoldering fire (T. 882).

Brenda's carbon monoxide was low, below the level usually causing death (T. 885). Her death was attributed to breathing superheated air (T. 885). Her urinary bladder was very full, painfully so, and her blood alcohol was .25% (T. 886, 888). Skip thought he remembered Brenda walking into the dining room area and saying something like "Oh my God" just before he left the home (T. 1130). Her position and physiological evidence were consistent with that. At the time

of the fire, Skip's blood alcohol was predicted to be .12% or .13% (T. 892)

The defense's theory of the case was that the cause of the fire was accidental (T. 1399). The house was covered with synthetic carpeting. It was the defense experts' belief that in the fire, the carpet burned, melted, and became a liquid accelerant (T. 1320, 1339). To that end, the defense presented videotape experiments showing a carpet burning, turning to a liquid, dripping, and then continuing to burn (T. 1317). The testimony also was that the heaviest damage to the house was over the carpeted area. However, the defense experts could not view the scene and therefore could not find the cause of the fire with any certainty (T. 1303, 1364).

The witnesses testified that the fire department began spraying water from the pumper truck onto the house and

appeared to have the fire under control. However, the pumper truck ran out of water and the house reignited before the hose to the hydrant was connected (T. 146, 284). Defense experts testified that the marks that the fire investigators found on the floor, which were suspicious, could be caused by the pressure from the hoses blowing fire and debris around the room. This was especially possible because they ran out of water (T. 1304, 1340, 1342, 1343, 1345). The fire was attacked from an east-west direction. Thus, the east-west paterns of the burns would also be consistent with the marks that the arson investigators found suspicious (T. 1356). It was also defendant's position that as Skip lay on his living room couch, he was breathing oxygen depleted air causing disorientation and confusion. When he left the house, he opened the door, and a

flash back fire occurred (T. 1402). This is a fire situation that is mostly smoldering and very little flame. The fire consumes oxygen faster than it is being replaced. However, when a fresh supply of oxygen gets into the room, as when a door opens, the oxygen triggers the fire and the fire reignites. The defense expert also said a flash back fire was consistent with the burn characteristics (T. 1376, 1402-1406) and the observations of the neighbors (T. 1414-1415).

During the last day of trial, when the State's chemist testified in rebuttal, it was discovered for the first time that the chemist ran more than one chromatogram for each sample. This was contrary to his testimony and the assumptions each party made. The missing chromatograms were in Maryland (Motion Transcript, New Trial Motion papers,

Court Order for New Trial Motion; Appendix C).

Skip Berndt was convicted of eight counts of First Degree Murder. He was sentenced to life imprisonment on four counts. It was ordered that the sentences be served concurrently (T. 2342).

In Berndt's motion for a new trial, Robert Davis again testified. This time he was able to testify that based on the missing chromatograms, the State's chemist did not perform a purge and trap analysis as that term is used in the scientific community (M.T. 27-28). Also, that the method of analysis contaminated the sample, therefore the result was unreliable (M.T. 40-43). Further, Mr. Davis testified that the manufacturers of the gas chromatographs did not accept or recognize the State's methodology (M.T. 26-28).

Finally, Mr. Davis discovered that in making the determination that a particular chromatogram showed the presence of gasoline, the State's expert did not view the entire chromatogram but only certain areas. This was improper from Mr. Davis' position because it disregarded retention time. Retention time is the time it takes a compound to appear on the chromatogram after it has been injected into the chromatograph (M.T. 15-18). There is computer assistance in plotting retention time which the State's chemist had access to but did not utilize (T. 2171-2172). Rather than utilizing the purge and trap method, the State's expert punched a number of holes in the bottoms of the cans and sucked room air through the sample containers. Robert Davis testified that the chromatograms he was given after trial show significant

differences, one from the other, for the same sample. This does not happen unless other substances contaminate the sample. Consequently, Mr. Davis testified that there was no way to determine the true identity of the samples that were analyzed (M.T. 41-42).

Berndt's motion for a new trial was denied and he filed this appeal to the Supreme Court.

ARGUMENT

I.

THE FAILURE TO PROVIDE THE DISCOVERABLE MATERIAL REQUESTED BY SKIP BERNDT'S ATTORNEY REQUIRES REVERSAL AND A NEW TRIAL BECAUSE THE FAILURE VIOLATED THE MINNESOTA RULES OF CRIMINAL PROCEDURE AND THE REQUIREMENTS OF BRADY v. MARYLAND, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

A. Introduction

At trial, Richard Tontarski testified for the State. Mr. Tontarski is employed by the Bureau of Alcohol, Tobacco, and Firearms as a forensic chemist. He received his Bachelor's degree in foreign affairs from the University of Virginia in 1976. He received his Master's degree in forensic science from George Washington University in 1978. Although he does not possess a bachelor's degree in chemistry, he has completed equivalent course work (T.

532). Mr. Tontarski received 26 samples taken from Skip Berndt's home (T. 536). Each sample was what fire investigators believed to be suspicious and indicative of burning by means of an accelerant (T. 351).

Mr. Tontarski testified that he analyzed the samples by means of a gas chromatograph (T. 537-540). A gas chromatograph is able to record graphically any hydrocarbon present in the sample. A hydrocarbon is a compound made up of hydrogen and carbon. There are between 300 and 400 distinct hydrocarbons in gasoline. The graphic representation produced by a gas chromatograph is called a chromatogram. The method of gas chromatography that Mr. Tontarski used was known as "purge and trap" (T. 2158-2159), also called the charcoal tubing technique (T. 539-540).

Of the twenty-six samples taken from the scene, Mr. Tontarski concluded that five showed the presence of hydrocarbons similar to those found in gasoline. In his opinion, the source of those hydrocarbons was gasoline. He believed gasoline was present in State's Exhibits 20 (stairway tread), 21 (entry), 22 (living room carpet), 23 (kitchen window sill), and 24 (northeast bedroom floor). The location in the home of these samples is indicated by circled "G" on Appendix A and B.

Pursuant to Rule 9 of the Minnesota Rules of Criminal Procedure, the defense specifically requested the chromatograms of the samples in which Mr. Tontarski found the presence of gasoline. Mr. Tontarski provided the defense with five chromatograms, one for each sample in which he believed gasoline was present (T. 556, 560, 562). He also provided the

chromatogram standards with which he used to compare the sample chromatograms (T. 555). These standards were introduced as Defendant's Exhibit A (T. 556). The chromatograms Mr. Tontarski provided the defense were also introduced into evidence as Defendant's Exhibits B (T. 556), C (T. 560), D (T. 560), E (T. 562), and F (T. 562). The standards which Mr. Tontarski provided to the defense (Defendant's Exhibit A) were necessary because the chromatograph itself does not identify the substances which are present. Any conclusion reached as to the identity of a substance depicted on the chromatogram is a subjective decision made by the examiner upon comparison of the chromatogram of the unknown sample with the chromatograms of the standards and considering elution time and quantity present (T. 585). Because Mr. Tontarski provided only one

chromatogram from each of the five samples, it was assumed by both the defense and the prosecution that there were no others (T. 1867-1868). Indeed, in his testimony, Mr. Tontarski clearly created this confusion. He sent five chromatograms to defense counsel. He never said there were others. In the following testimony, he said he sent a copy of "my chromatogram" for State's Exhibit #21; he did not say, "one of my chromatograms."

> Q. Mr. Tontarski, I am now going to show you what has been marked as Defendant's B. I am going to ask you to explain to the jury what that might be?
>
> A. This is a chromatogram or a Xerox copy that I provided of my chromatogram of Exhibits Number B-39 as I received it.
>
> Q. Okay. Is that -- Then you sent a copy to me in the mail?
>
> A. Yes. After you requested that, yes.

Q. Thank you. Is that an accurate copy to the best of your recollection of your actual chromatogram that was received from Sample B-39?

A. Yes, it is.

(T. 556, f. 13-25).

The defense presented expert testimony which disputed the State's theory. The defense expert, Robert Davis, testified that the five chromatograms he was presented (Defendant's Exhibit B, C, D, E, and F) did not show the presence of gasoline. However, Mr. Davis was puzzled by the condition of the containers in which the samples were placed. Given the fact that the State's chemist used the "purge and trap" method, Mr. Davis could not explain the presence of numerous holes in the bottoms of the containers.

On the day testimony ended, Mr. Tontarski was recalled to offer rebuttal

testimony. At that time, he revealed to the prosecutor the existence of other chromatograms which he believed showed the presence of gasoline in State's Exhibits 20-24. These had not been previously supplied to the defense. He also informed the prosecutor he could not produce the chromatograms because they were in his laboratory in Rockville, Maryland. This was the first time defense learned of the existence of the additional chromatograms.

Skip Berndt was convicted. Pursuant to a motion for new trial, the Honorable Doris Huspeni ordered that testimony be taken. Robert Davis was again called as a witness. His testimony is contained in the transcript volume entitled "Motion" and is referred to as M.T. (Motion Transcript). The Court also ordered that the additional positive chromatograms not supplied to the defense be turned over.

After analysis of the withheld chromatograms, the defense can now present additional relevant evidence in three areas. First, Mr. Tontarski did not use the "purge and trap" method of analysis as that phrase is used by the scientific community. Further, the methodology used by Mr. Tontarski is not a recognized reliable technique by either the scientific community or the manufacturer of the chromatograph (M.T. 27-28). Second, the compounds Mr. Tontarski considered important in the withheld chromatograms are found in ordinary building materials, such as carpet and tile mastic (M.T. 29-31). Third, the integity of the sample had been violated thereby causing an incorrect interpretation (M.T. 40-43).

B. Analysis of Discovery Provisions of the Minnesota Rules of Criminal Procedure.

It is uncontroverted that a timely

demand was made for all of the positive chromatograms. It is also uncontroverted that all of the positive chromatograms were not delivered to the defense. The demand for the production of the positive chromatograms was made pursuant to Minnesota Rules of Criminal Procedure, Rule 9.01, subd. 1(4), which reads as follows:

> (4) Reports of Examinations and Tests. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case. MRCP 9.01, subd. 1(4).

Even though the prosecutor was unaware of the existence of the chromatograms until the end of trial, the duty to disclose is a continuing one on the State (see Rule 9.03, subd. 2 (a) and (b)). That duty was not satisfied in this case.

The Minnesota Supreme Court has announced a hard and fast rule to remedy a Rule 9 violation. In State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), the Court reversed an arson conviction and ordered a new trial. The Court stated:

> Consequently, in this case, although the evidence of defendant's guilt was strong, we conclude that a new trial is required in the interest of justice and to insure that the reciprocal discovery rules adopted by this court are observed by both the prosecutor and the defense. (Emphasis added).

Schwantes, at 245.

It is crucial to note that the Court did not consider the motives of the prosecutor, whether the violation was advertent or inadvertent, or the weight of the evidence. The Court ordered a new trial simply based upon a Rule 9 violation. The Court also held that the prosecutor has an affirmative duty to

disclose the information. It is not for the defense to go on a fishing expedition to uncover all discoverable evidence.

The State's position regarding the nonproduction of the additional chromatograms was that the defense could have discovered them by careful and vigorous interview and investigation of the State's expert. That position confuses the standards of newly discovered evidence with a Rule 9 violation. The standard of newly discovered evidence has no aplicability to a Rule 9 analysis.

The State raised the same issues in Schwantes. Schwantes was convicted of arson. After defense counsel made discovery of the prosecutor's file, an agent from the Bureau of Alcohol, Tobacco, and Firearms filed a report which included statements the defendant's wife made which destroyed defendant's

alibi. That report was not given to defense counsel. The State argued that any failure to disclose was inadvertent. Also, the witness was defendant's wife who was interviewed by the defense attorney; the State argued that it should not be penalized for the wife's failure to disclose her conversation to her husband's lawyer. The Court found none of those arguments persuasive, reversed, and ordered a new trial.

In the case before this Court, the evidence of guilt is not strong, as it was in Schwantes. At best, it is a close call. It was only by mere chance that the presence of additional chromatograms was discovered. With this fortuity, the defense can now present evidence that might well result in an acquittal. The State failed to fulfill its affirmative obligation to disclose all discoverable items. Schwantes and

the interests of justice require a new trial.

C. Analysis of Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Pursuant to the motion for new trial, the trial court ordered the taking of testimony of not only Robert Davis but also Richard Tontarski, the State's expert. It is our position on appeal that consideration of Mr. Tontarski's deposition is improper. It confuses the rules on newly discovered evidence with exculpatory evidence and the discovery requirements of the prosecutor. In newly discovered evidence, the moving party must show the evidence was not discoverable exercising due diligence and also show a substantial likelihood that the new evidence would change the outcome at trial. State v. Jacobson, 326 N.W.2d 663 (Minn. 1982). The court in Schwantes, in reversing a conviction

where evidence was strong based upon the non-disclosure of evidence that made guilt even stronger, made it abundantly clear that the impact on the jury was not relevant.

It is also Skip Berndt's contention that failure to provide the other positive chromatograms was the non-disclosure of exculpatory evidence and thereby also requires a new trial. Based on Mr. Davis' testimony, the defense would have moved the Court, pursuant to Frye v. United States, 283 F. 1073 (D.C. Cir. 1923), for an order barring the testimony of the State's expert on the grounds that the method used was not recognized by the scientific community nor the manufacturers of the gas chromatograph. The additional chromatograms which were provided the defense after trial showed shifting and were different, one from the other, on

the same sample (M.T. 32). Chromatograms that show such a change can only do so because foreign objects have been introduced into the sample (M.T. 32).

The following testimony of Mr. Davis is illustrative:

> At that time I left this Courtroom at the original trial, it was still my belief that several samples were taken from the can and that the individual holes at the base of the can were from individual samples where one would be sealed while another sample is being taken.
>
> Now, having seen the methodology that was used, I realize that the holes were drilled in the cans in order to admit air from the surrounding atmosphere through the can while the samples were being taken to prepare it for the chromatograph.
>
> (M.T. 26-27).
>
> In my opinion that methodology will not give an adequate representation of what is in that sample.
>
> (M.T. 28, f. 19-21).

I contacted two manufacturers; Perkin-Elmer, who manufactures gas chromatographs and Varian Aerograph (Ph.)

Q. Who is that?

A. They also manufacture chromatographs. The man in charge of training there is Dr. David Dunham (Ph.) and I explained the method entirely to him. And he said --

(M.T. 27, f. 13-20).

The manufacturer's representative substantiated my position.

(M.T. 28, f. 10-11).

Accordingly, the State's chemist was inaccurate when he testified he used the purge and trap method of analysis. Also, the method was not scientifically accurate and therefore the result should not have been admitted.

The defense, now, could also show that the State's expert was not interested in the chromatogram as a whole but rather a certain portion of the range

of hydrocarbons occurring within a segment of the range of gasoline. As Mr. Davis testified:

A. Based upon the method that he used to interpret the chromatograms, I now have learned what peaks he was interested in when he was interpreting those chromatograms.

(M.T. 29, f. 6-9).

A. In your average household they [the peaks of interest] would be found in the normal plastics; they will be found in the acrylic monomer-type carpet, the PBC-type carpet, the mastic that holds down floor tiles. Those are the places that I can think of immediately without going too far.

Q. We didn't know that the first time around?

(M.T. 29, f. 20-25).

A. I did not know the compounds that he was especially looking at.

Q. And then you found that out because of additional information that we received?

A. That's correct.

(M.T. 30, F. 1-5).

Finally, Mr. Davis would testify regarding the importance he attached to the fact that the chromatograms from the same sample were different, something which does not happen in chromatography that is done correctly.

A. The chromatograms themselves that were supplied in the latest group of evidence represent both materials that were called negative and materials that were additional runs of those samples which were ascertained to be positive.

(M.T. 30, f. 22-25).

A. In the latest production of documents there would be two or three additional A-10s [State's exhibit 22]. Now, the thing that I would tell the jury and that I have discussed completely is that each of those additional A-10s individually are different.

Q. What significance does that have?

A. It demonstrates beyond any doubt in my mind that the technique that was used was totally defective, chromatograms will not shift, they will not change of an identical sample. In addition to this, there is apparent an anomaly or abnormality in those chromatograms that as a sample remained in the laboratory longer,

(M.T. 31, F. 11-25).

additional hydrocarbons were pulled from that sample in greater amounts . . .

The significance is which of the three or four or two chromatograms do I believe? The first one which was run which is an insignificant amount of hydrocarbons? The second amount which has a greater amount of hydrocarbons and the third one which is completely off the scale of the chromatograph . . .

no sample will change that much if it is properly secured. There are demonstrated in this trial, chromatograms that had insignificant amounts present the first day they were analyzed . . .

A. The peaks that were there will always be there regardless of what technique you use, the quantity removed by your preparation technique may change, but those peaks will individually be there.

Now, . . . run a second sample . . . all of a sudden we have new

(M.T. 32, F. 1-25).

hydrocarbons appearing. The ones that were there before may or may not be there from the first sample run. Now, we are going along to the third run and we have an entirely different sample matrix, which demonstrates to me that the sample integrity has been violated.

(M.T. 33, F. 1-5).

The problem is exacerbated by the fact that of the five chromatograms run on the same sample, none of which produced the same result, we do not know which one in the series of three, four, or five were provided to the jury or

which one was used by Tontarski to form his opinion.

Even if the Court ruled the above evidence was insufficient to bar Mr. Tontarski's testimony, it would still be relevant as exculpatory evidence. This State has a long history favoring the introduction of such evidence and also consciously refraining from predicting the impact the evidence would have on a jury. In State v. Bock, 229 Minn. 449, 39 N.W.2d 887 (1949), the defendant unsuccessfully attempted to introduce testimony to show that two Spreigls were committed by someone else. The Supreme Court reversed the conviction, holding the evidence offered by the defendant should have been received. But, more importantly, the Court held that it was not for the Court to attempt to determine the importance of the evidence. Rather, the importance must be determined by the

jury. The Court cited and adopted the reasoning of Commonwealth v. Murphy, 282 Mass. 593, 183 N.E. 486 (1933):

> Mistake in identification by one person does not prove another one wrong. These are considerations for a jury. But, owing to the ruling, no jury has passed upon them . . . it would seem that the defendant is entitled to have a jury consider the evidence, pass upon its credibility and weigh it with the evidence of identification upon the issue of his guilt. Bock, at 457.

The United States Supreme Court has also held that a Court should not intervene in the jury's function and attempt to independently determine what weight to attach to exculpatory evidence. In Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), exculpatory evidence at the sentencing phase of the trial was suppressed by the prosecution notwithstanding defense counsel's attempt to examine it. The Court held that failure to disclose

exculpatory evidence was a denial of due process. The Court also held that the weight of that evidence should be passed upon by the jury, not the Court. In citing the lower court with approval, the Court stated:

> There is considerable doubt as to how much good [the] undisclosed confession would have done Brady if it had been before the jury . . . We cannot put ourselves in the place of the jury and assume what their views would have been . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

Brady, 373 U.S. at 88, 10 L.Ed.2d at 219.

The chromatograms of the positive samples Tontarski made are clearly the results of a scientific test. Consequently, defense had a right to it before trial. Schwantes requires a reversal and a new trial. The withheld chromatograms call into question the very

methodology the State used. As a result, the defense would have attempted to bar the State's expert's testimony on the ground that his method was not recognized by the scientific community. If the method is invalid, the result is also. This requires reversal and a new trial. Finally, it is Skip Berndt's position that the withheld information is exculpatory. It is exculpatory because it graphically shows the appearance of new substances as the testing procedure continues. It is exculpatory because the chemist was not concerned with an entire chromatogram but limited areas within the chromatogram. It is exculpatory because it shows the State's method of analysis was not only unreliable, but also tainted. Brady requires reversal and a new trial.

II.

BECAUSE THE PRIMARY OBJECTIVE OF THE SEARCH OF APPELLANT'S HOME WAS TO SEIZE EVIDENCE OF ARSON TO BE USED AGAINST APPELLANT, A SEARCH WARRANT WAS REQUIRED. THEREFORE, FAILURE TO SUPPRESS THE EVIDENCE CONSTITUTES PLAIN ERROR REQUIRING REVERSAL.

Skip Berndt's Fourth Amendment rights were violated by fire and police arson investigators when they seized a variety of samples, solely for the purpose of gathering evidence of arson. The samples were seized from Skip's home without a search warrant and neither pursuant to any exigent circumstances encompassing a continuous fire investigation. The Fourth Amendment to the United States Constitution, and Article I, section 10 of the Minnesota Constitution, protect the right of the people to be secure in their persons, houses, papers, and effects against

unreasonable searches and seizures. This protection extends to fire damaged property, especially when a private dwelling is involved. See, Michigan v. Clifford, ___ U.S. ___, 104 S.Ct. 641, 78 L.Ed.2d 477, 483 (1984); Michigan v. Tyler, 436 U.S. 499, 505 (1978); State v. Olsen, 282 N.W.2d 528 (Minn. 1979).

A search conducted without a warrant is per se unreasonable, Coolidge v. New Hampshire, 403 U.S. 443 (1971), and evidence seized is subject to the exclusionary rule. This rule is subject only to a few specifically established and well-delineated exceptions. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973), quoting Katz v. United States, 389 U.S. 347, 357 (1967). These exceptions arise pursuant to a variety of circumstances, called "exigent circumstances", that justify dispensing with the warrant requirement for a search

in a particular place. Coolidge, 403 U.S. at 474-75.

In cases involving fire fighters entering a fire scene, the Court has recognized three related exigencies which justify dispensing with the warrant requirement in limited cases. First, fire fighters may enter a burning building as an "emergency response" unrelated to the gathering of evidence. Second, fire investigators may enter the post-fire site to determine the cause of the fire as a "public interest" exigency. Finally, as a corollary to the second exception, administrative officials may remain on the site a reasonable time pursuant to a continuous search contemporaneous with determining the cause of the fire and preventing rekindling. Skip does not assert a violation of his constitutional rights

due to the initial entries to fight the fire in his home.

* * *

A. The Public Interest Exigency.

1. Cause of the Fire.

The need to search in post-fire inspections flows from the need to protect the public safety. "The aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or to secure the owner's consent to inspect fire-damaged premises. Because determining the cause and origin of the fire serves a compelling public interest, the warrant requirement does not apply in such cases." Clifford, 78 L.Ed.2d at 484; see also, State v. Olsen, 282 N.W.2d 528, 531 (Minn. 1979).

To justify a warrantless post-fire entry, the need to search must be to determine the cause of the fire.

However, it is equally clear that where no such exigency exists, and in the face of probable cause that a crime has been committed, the law is preemptory in its requirement that investigators first obtain a search warrant before entering another's premises without consent. Tyler, 436 U.S. at 512; citing Camera v. Municipal Court, 387 U.S. 523, 534 (1967). "If the primary objective of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched." Clifford, 78 L.Ed.2d at 484-85.

2. Continuous Search.

Having made the initial post-fire entry, the officials may remain a reasonable time as part of a continuous search. While not clearly delineating

the limits of a "continuous search," the Court in both Tyler and Clifford makes clear that it must be contemporaneous with the public interest served in finding the cause of the fire and preventing rekindling.

The need to search will vary with the complexities involved in the fire site. Fires in massive commercial structures may justify an extensive search, with multiple re-entries, even after the cause is known. The possibility of rekindling is far greater in such cases. However, small homes will not pose such problems, and once the cause is known, any further search may require a warrant. Tyler, 436 U.S. at 510, n. 6; Clifford, 78 L.Ed.2d at 487, n. 9.

The Tyler and Clifford cases make evident that if the primary objective of the search is to gather evidence of a

crime, a criminal search warrant is required, and may only be obtained on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. Id. at 484-85. The entry no longer serves the recognized need to protect the public interest which justified the entry to find the cause of the fire and the continuous search to prevent rekindling. The exception for exigency, like other exceptions to the warrant requirement, is limited in reach "to that which is necessary to accommodate the identified needs of society." Arkansas v. Sanders, 442 U.S. 753, 760 (1979); Mincey v. Arizona, 437 U.S. 385, 393 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). Thus, "[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of

probable cause] will apply." Tyler, 436 U.S. at 510.

The Court has not created a new "continuous search" exception, because the search is limited to the underlying exigency. "Such investigations constitute a continuation of the first legal warrantless entry, and do not violate the Fourth Amendment of the Constitution since a compelling public interest is served in determining the cause and origin of fires." Commonwealth v. Smith, 479 A.2d 1081, 1085 (Pa. Super. 1984) (Cirillo, J., dissenting), citing Tyler, 436 U.S. at 509.

* * *

In the instant case, the "public interest" rationale does not justify the search and seizure from appellant's home. Police
and fire arson investigators seized samples of carpet, floor, wall, tile, and

other samples in an accusatory search intended to gather evidence of arson to use against Skip. The rationale may not be applied to a search made after the exigency lapsed, where fire and police arson investigators suspected Skip of arson, cordoned off his home leaving specific instruction not to touch the site, accused and interviewed Skip regarding arson, and later returned to search for and seize evidence of arson.

The entries cannot be said to have been made pursuant to a "public interest" exigency either to determine the cause of the fire or to prevent rekindling. The fire was reported at 2:51 a.m. on Friday, August 22, 1981 (Omnibus Hearing Transcript, page 67) (hereinafter cited as O.H.T.). Firemen arrived at 2.56 a.m., by which time the fire engulfed the entire home (O.H.T. 67). They controlled the fire around 3:34 a.m. (O.H.T. 46).

The firemen then made an initial sweep of the house to look for fire victims (O.H.T. 48).

Prior to the initial search, officials suspected arson. Brooklyn Center Fire Marshall Gerald Pedlar, the man in charge of all of the operations, stated on direct examination:

> Q. "Up to the point of finding the victims, was there anything about the fire that aroused your curiosity as a cause and origin investigator?"
>
> A. "Yes. In talking with the individuals, the police officers, at the scene, the fact that the fire alarm came in at 2:51, the first truck arrived on the scene at 2:56, and at that time we have total involvement of the entire townhouse area is unusual in itself."

(Trial Transcript, page 729) (hereinafter cited as T.T.). Upon entering the building to search for the fire's victims, Pedlar saw heavy bubbling, scarred areas in the tile in the entry

hall, which he said was unusual and had only seen once before (O.H.T. 87). He thought an accelerant must have been used (O.H.T. 88). No evidence was seized on this initial search, nor had any evidence of low burn or the possible presence of flammable liquid been discovered (O.H.T. 66).

After this initial sweep search for the victims of the fire, Marshall Pedlar instructed District Chief Robert Drew "that none of the scene was to be touched until we got back to initiate our investigation" (T.T. 735) (Emphasis added). Pedlar wanted to interview Skip about the circumstances of the fire and asked the police to see him (O.H.T. 67).

Both police and fire officials treated Skip as the suspect in an arson case prior to the seizures in question. Joel Downer, of the Brooklyn Center Police Department, consulted with ranking

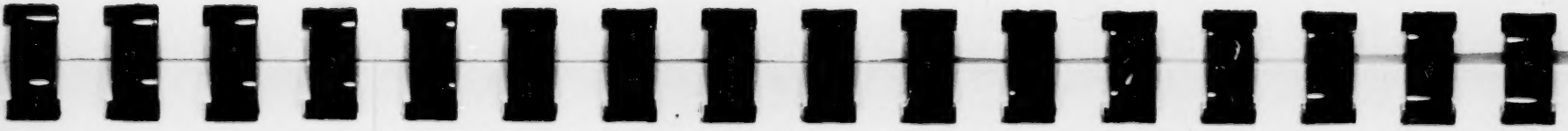
fire officials at the scene, who told him the fire was of a suspicious origin (O.H.T. 101). In response to this advice, Downer ordered Brooklyn Center Policeman Adams to bring Skip in for questioning (O.H.T. 101). Officer Adams was told to treat him as a suspect and to bring him back "whether he wanted to come or not" (O.H.T. 16).

Officer Adams brought Skip from his sister's house to the Brooklyn Center Police Department at about 5:30 a.m. (O.H.T. 33). He frisked Skip for weapons (O.H.T. 17), placed him in a locked cell block (O.H.T. 19), and told him he was a suspect (O.H.T. 20).

At 6:00 a.m., the police and fire arson investigators interviewed Skip about the fire (O.H.T. 113). Present were Detective Spehn and Sergeant Downer, Brooklyn Center Police Department, Lieutenant Running and Detective Harding

of the Hennepin County Sheriff's Department, and Marshall Pedlar (T.T. 968). Detective Spehn told Skip that he was a possible suspect "because of the fact that we had been informed by fire investigators at the scene that this was a very rapid fire; the fact that there were four fatalities and that he was the only apparent survivor . . ." (O.H.T. 113). Detective Spehn then read Skip his rights under Miranda (O.H.T. 113).

In Clifford, the Court found unconstitutional a search where investigators had probable cause to believe arson occurred. Clifford involved a fire in a private home. Fire fighters extinguished the fire at 7:04 a.m. and left. An arson investigator was told to inspect the site at 8:00 a.m., but he was delayed until 1:00 p.m., by which time the Cliffords had already had workers board up the home. The



investigator found a fuel can the firemen had discovered and left by the door. When the basement was pumped out, the arson investigators entered, detected fuel odor, and found evidence that a timing device was possibly used to start the fire. The investigators then moved from the basement to search the rest of the two-story house.

Applying Tyler, the Court found that the arson investigator's entry violated the Fourth Amendment. The Court found two separate entries: the first of the basement concerning the cause of the fire, and the second of the upstairs concerning evidence of the fire. Clifford, 78 L.Ed.2d at 485. The need to search the basement for the cause of the fire was justified by the "public interest" exigency. However, while the initial basement entry was appropriate under the "public interest" exigency, the

search of the rest of the house was unconstitutional. "Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson. Absent exigent circumstances, such a search requires a criminal warrant." Id. at 486.

As in Clifford, when the officials in the instant case began the second search, they were looking for evidence of arson implicating Skip. At 9:00 a.m. on Saturday, August 22, Marshall Pedlar returned to the scene (O.H.T. 70). Pedlar met Detective Spehn, and Ward Mahlen, assigned to the Crime Lab at the Hennepin County Sheriff's Department, at the scene, and they began their search for evidence implicating appellant of arson (O.H.T. 70). They were looking at

the low areas of the townhouse and the consumption of combustibles (O.H.T. 60).

After the intial sweep, Pedlar knew that the fire was out and would not rekindle. He ordered the area cordoned off and ordered that no one was to touch anything. Pedler than left and did not return for three hours, after interviewing Skip as an arson suspect. No investigation into the cause of the fire had been initiated in the early morning sweep. The investigation was not begun until 9:00 a.m., and cannot be viewed as a continuation of the early morning sweep. When Pedlar and the others returned, they were looking for arson evidence to use against appellant.

* * *

The present record rebuts exigency because it contains nothing to show that it was impossible or unreasonable for the investigators to obtain a criminal

warrant. There was no evidence that a delay in the search and cleanup efforts would have endangered the public safety, created additional danger, or otherwise have been unreasonable. Clearly, there was adequate time and opportunity for Spehn and Pedlar to obtain a search warrant. At best, there is a suggestion of inconvenience, but constitutional guaranties must always prevail over mere convenience to police and fire officials.

III.

THE PRESENTATION OF THE STATE'S CASE DENIED SKIP BERNDT A FAIR TRIAL.

A. The State Introduced Evidence To Prove Skip Berndt's Bad Character Even Though Skip Berndt Did Not Place His Character In Issue.

"No rule of criminal law is more thoroughly established than the rule that the character of the defendant cannot be attacked until he himself puts it in issue by offering evidence of his good character." City of St. Paul v. Harris, 150 Minn. 170, 171, 184 N.W. 840 (1921). This rule has been codified with the adoption of the Minnesota Rules of Evidence in Rule 404(a). The Minnesota Supreme Court in State v. Loebach, 310 N.W.2d 58, 63 (Minn. 1981), listed three basic reasons for the rule:

> First, there is the possibility that the jury will convict a defendant in order to penalize him for his past misdeeds or

> simply because he is an undesirable person. Second, there is the danger that a jury will overvalue the character evidence in assessing the guilt for the crime charged. Finally, it is unfair to require an accused to be prepared not only to defend against immediate charges, but also to disprove or explain his personality or prior actions.

In the instant case, the State, by introducing character evidence, invited the jury to find appellant guilty on the basis of his lifestyle. That evidence includes the following characterizations:

1. That appellant had attempted sexual relations with Amanda Simmons, a minor who babysat for the Berndts, three years before the fire (T. 510-519).

2. That appellant attempted to have an affair with Mrs. Berndt's sister, Marla Henne, prior to and during his marriage to Mrs. Berndt (T. 608-621).

3. That appellant discussed

swapping wives with Glenn A. Snow on the night of the fire (T. 626-634).

4. That appellant may have been womanizing and was drinking the night of the fire (T. 638-643).

5. That appellant had touched the breast of Miss Sandra Jacobs when she was a passenger in a car driven by appellant when Mrs. Berndt was also present (T. 657-660).

6. That appellant would, at times, get moody and mad when drinking (T. 684).

In addition, appellant was characterized as a drug user (appellant admitted to smoking marijuana). Yet, "evidence of other crimes is not admissible to prove that an accused is a bad person and therefore likely to have committed the crime in question. Indeed, the rule is beyond dispute . . ." United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973) (citations omitted).

It cannot be overstated that the introduction of the bad character evidence should have been excluded. However, since such evidence was before the jury, the damage has been done and the remedy is either a mistrial or reversal. As the Minnesota Supreme Court stated in State v. Saucedo, 294 Minn. 289, 200 N.W.2d 37, 39 (1972), to allow the jury to consider the defendant's possible participation in "unlawful activity other than that of which he has been formally accused cannot but jeopardize the fairness and trustworthiness of its verdict and cannot but work to defendant's prejudice."

The State's position was that this evidence was necessary to show a motive to act. However, both Mr. & Mrs. Berndt ended a previous marriage through divorce. There was no evidence to show why he would now use murder to end a

marriage. Further, there was no evidence that the marriage was unstable. The State's motive theory is simply the belief that Skip Berndt should be convicted because he is morally offensive. Consequently, a new trial is in order.

B. The State Urged The Jury To Speculate And Thereby Base Its Decision On Factors Not Admitted Into Evidence.

The presentation of the State's case further denied Skip Berndt a fair trial because it urged the jury to speculate on factors not admitted into evidence. The State urged the jury to speculate that Skip and Brenda Berndt had had a fight that evening prior to the fire resulting in a blow to the head of Brenda. The coroner testified that he saw no concussion or fracture to Brenda Berndt's head (T. 885-886). However, he could not

rule out the possibility that she was struck in the face and knocked out (T. 887). No gas can or syphoning equipment was ever found but the jury was asked to speculate on three possible scenarios: (1) that Skip stole the gas from the caretaker's supplies even though the caretaker testified he had noticed no missing gasoline and no fowl play with regard to his equipment (T. 918); (2) Skip syphoned gas from cars in the parking lot, however, no evidence was presented to that effect; and (3) that no cannister for the gasoline was found because Skip had thrown the gasoline cannister in the garbage dumpster which was emptied in the morning of August 21, 1981. However, there was no evidence to support these premises.

The jury was also asked to speculate and accept the premise that only guilty persons would run to safety from a

blazing fire. In relationship to Skip's flight to safety, the jury was also asked to speculate that appellant was guilty because he showed a lack of emotion when visited by the hospital Chaplain (T. 1056). However, the Chaplain testified that Skip's reaction was a cause for concern because he was internalizing his grief (T. 1057-1058). The jury heard evidence by the defense of Skip's emotional collapse later in the day when he was with his family and minister (T. 1237).

Finally, the State urged the jury to speculate as to the amount of gas present in the home of Skip (T. 930). The State's expert guessed there was a minimum of five gallons (T. 930). However, no scientific experiments were offered into evidence by the State to duplicate its assertion on the amount of gasoline. In addition, the testimony

concerning a fire caused by five gallons of gasoline ranged from the possibility of no ignition to a building-demolishing explosion. Such "evidence" allows the jury to guess and select whichever set of facts it likes.

The presentation of these speculations denied Skip Berndt a fair trial because it allowed the jury to speculate on factors not admitted into evidence resulting in prejudicial harm to Skip and requiring reversal of his conviction. Berger v. United States, 295 U.S. 78 (1934). The Court in Berger warned that " . . . improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accued when they should properly carry none." 295 U.S. at 88.

C. The Intentional Delay In Bringing Charges Against Skip Berndt Denied Him The Opportunity To Prepare A Defense.

The Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. United States v. Gouveia, ___ U.S. ___, 81 L.Ed.2d 146, 104 S.Ct. ___ (1984). In the instant case, the indictment should have been dismissed because the government's delay in bringing the indictment was a deliberate device to gain an advantage over appellant which resulted in actual prejudice in presenting his defense. The State possessed all the facts shortly after the fire. Indeed, Mr. Berndt was

informed on October 6, 1981, that the case was at the county attorney for charging. However, Skip was not indicted until August 17, 1982, approximately four days short of one year after the August 21, 1981 fire. The delay in the indictment resulted in extreme prejudice to Skip because he, through his attorney, was unable to independently view and evaluate the fire scene.

Generally, the State has no duty to charge. However, once an individual has been charged, there is an obligation by the defense attorney to diligently investigate the facts. The Defense Function Standards make this duty clearly specific:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the

> possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

American Bar Association Project on Standards for Criminal Justice, The Defense Function §4.1. The comments to this standard cite Shepherd v. Hunter, 163 F.2d 872, 873 (10th Cir. 1957), for the proposition that "failure to make adequate pre-trial investigation and preparation may be grounds for finding ineffective assistance of counsel." Commentary, Defense Function §4.1.

In the instant case, defense counsel had no opportunity to investigate. While the State possessed evidence detrimental to Skip (26 samples were taken from Skip's home), Skip had no opportunity to investigate due to the delay of the indictment. When Skip had been indicted,

the scene of the fire had been demolished. Thus, Skip could only rely on the State's evidence for his defense. In addition, the State's witnesses testified as experts in the field of fire protection and arson stemming from their role as fire fighters. Their opinions were based on visual observation of the scene. Skip was denied an effective opportunity to rebut those opinions formed by observation because the scene of the fire had been destroyed before his indictment, denying him the opportunity to prepare a defense. Thus, the inordinate delay between the alleged crime and indictment resulted in the intentional impairment of Skip's ability to present an effective defense.

Skip Berndt was told on October 6, 1981, by Donald Spehn of the Brooklyn Center Police Department that they considered the case a homicide and would

take it to the grand jury (O.H.T. 129). If that was their position, why wait until nearly one year from the offense to charge Skip? The importance of investigation cannot be overstated. One of the defense experts who testified at trial, Shelby Gallien, noted that on-scene early investigation is crucial to determine the cause of the fire; you cannot rely on the observations and subjective judgments made by others (T. 1303). Failure to charge and the resulting prejudice requires a new trial.

D. The Final Argument Of The Prosecutor Was Improper And Prejudicial And Requires A New Trial.

In his argument to the jury, the prosecutor commented that Skip had been charged by the grand jury. He said, "[a]nd it is the State's evidence and the accusation by the grand jury of this

county that that someone was sitting right here in this courtroom . . . ." (T. 2225). The function and accusation of the grand jury are improper for the petit jury to consider. State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973). The prosecutor also impermissibly "invited the jurors to put themselves in the shoes of the victim . . .", State v. Taylor (Minn., filed April 9, 1985), when he stated the following:

> When we selected a jury here, there was some talk about jurors having somebody's life in their hands. Well, let me suggest to you that we are talking about five lives. Only one of them had the benefit of the jury.

(T. 2232). The prosecutor also implies by such a statement that Skip Berndt should not be entitled to a trial. The prosecutor impermissibly interjected his

personal feelings of guilt when he stated the following:

> I will share my attitude with you about that possibility. I find it impossible to believe he would have run out without trying to help those boys. The investigators experienced with fire and gasoline fumes reached the other conclusion: it would have been impossible for him to do it. If it were possible for him to do it, I find it impossible to believe he wouldn't have gone upstairs to get those children.

(T. 2225). "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." American Bar Association Project on Standards for Criminal Justice, The Prosecution Function §5.8.

The prosecutor also misstated the presumption of innocence, the burden of proof, and the function of the jury in his final argument. He said, "You have

two directly opposing stories before you, or cases before you. You are going to have to make your decision based on one or the other" (T. 2225). The prosecutor also said that, "We're not talking now about credibility; . . . we're talking about physical evidence . . . not words that you can choose to believe or disbelieve . . . physical evidence . . . as opposed to self-serving claims and words . . . that have their roots . . . in one's believability or credibility" (T. 2227). Such a position says the jury's decision must be based on one version of facts or another. This disregards the function and power the jury enjoys in this state. State v. Cory, 182 Minn. 48, 233 N.W. 590 (1930); State v. Holbrook, 305 Minn. 554, 233 N.W.2d 892 (1975). It also says the defendant is not presumed innocent. It

also implies that the burden of proof is less than reasonable doubt.

The prosecutor continued this strain when he stated that, "If you find or feel that the defendant is not guilty, if you have a doubt about his guilt, you have to have a reason for that doubt" (T. 2234). This misstates the application of the law. It assumes a defendant is guilty and can only be acquitted if the jury can articulate a doubt. The standard is obviously the reverse. A defendant is presumed innocent and can only be convicted if guilt is proven beyond all reasonable doubt.

Finally, the prosecutor encouraged the jury to speculate as to what might have happened in the Berndt household on the night of the fire (T. 2244-2246), to consider Mr. Berndt's sexual indiscretions as to what might have happened (T. 2242), and to believe

without evidence that Mrs. Berndt suffered a blow to her head from Skip Berndt (T. 2257). These and other speculations were dealt with earlier. A jury's verdict cannot be based on speculation or innuendo.

This misconduct was grave. As a result, the Court may affirm only if it finds the error was harmless beyond a reasonable doubt. State v. White, 295 Minn. 217, 203 N.W.2d 852 (1973); State v. Caron, 300 Minn. 123, 218 N.W.2d 197 (1974). The errors require a new trial.

IV.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION.

The standard to review convictions for insufficient evidence is as follows:

> In reviewing a claim of sufficiency of the evidence we must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged . . . . The evidence must be viewed in the light most favorable to the prosecution and it is necessary to assume that the jury believed the state's witnesses and disbelieved any contrary evidence . . . ."

State v. Ulvinen, 313 N.W.2d 425 (Minn. 1981).

The State's theory is that Skip Berndt planned and intentionally killed his biological son, his two stepsons, and his wife by burning his house with gasoline. Because of the seriousness of the case and gruesomeness of the facts,

appellant believes the usual standard of review is inappropriate. It is appellant's position that in a case of this nature, the jury is so incensed by the facts that they may presume a defendant guilty. The jury exhibits a great fear of acquitting a possibly guilty person and correspondingly exhibits far less concern with convicting an innocent person. Because this may apply in a case of this magnitude, any admision of inadmissible evidence, any speculation by the jury, any prosecutorial misconduct, and any judicial error must be viewed more seriously than in the majority of cases.

This Court tacitly adopted this concept in State v. Ulvinen, supra. In Ulvinen, the defendant was convicted of first degree murder in aiding her son in the murder of her daughter-in-law. The facts included the mutiliation and

dismemberment of the victim while the defendant did not intervene. The Court reiterated the previous standard in determining sufficiency.

However, the Court was quick to recognize that the shocking facts of that case and the defendant's moral liability could cause the jury to convict the defendant in the absence of credible evidence. The Court wrote at page 428:

> The jury might well have considered appellant's conduct in sitting by while her son dismembered his wife so shocking that it deserved punishment. Nonetheless, these subsequent actions do not succeed in transforming her behavior prior to the crime to active instigation and encouragement.

Because of the facts of this case, this Court should review the evidence very, very carefully.

The State's witnesses erroneously leaped to the conclusion that the fire was caused by arson. The main reason for

that conclusion was that so much of the house was ablaze when the fire department arrived. Fire personnel said they arrived within five minutes of the call (T. 91). All of the neighbors disputed this estimate and said it was more like 10-20 minutes (T. 229, 283). The neighbors estimate is more realistic. First, Officer Adams arrived before the fire department and he saw Skip using a garden hose to put out the fire (T. 62-65). The neighbor spent some time in just getting the hose (T. 274). Secondly, Officer Adams looked for a ladder. He spent some time looking, including kicking in the door to the maintenance storage (T. 63). Thirdly, Officer Adams said he kept calling the fire department to tell them how serious the fire was (T. 61-62). Finally, Linda Kaui testified that she reported the fire. She said she called the operator

and was put on hold and transferred several times before she got the right fire department (T. 242-244). All of these lead to the belief that the fire had burned for a considerable time before the fire department arrived.

The State believed Skip spread a minimum of five gallons of gasoline throughout his house (T. 930). According to the State, his blood alcohol content was .13% (T. 892). It would seem that if a person with a .13% blood alcohol quickly sloshed five gallons of gasoline throughout his home, he would inevitably get some on him because of the rapidity with which the gasoline was spread. However, no one smelled gasoline on Skip. If he would have taken time so as not to get any gasoline on him, it would have vaporized, the fumes would have been drawn to him, and the home and Skip Berndt would have been no more. However,

the neighbors heard no explosion. The State's own expert, who guessed that five gallons were used, said there is instantaneous combustion of fumes throughout the structure (T. 935). The State's theory makes no sense.

The State's experts said gasoline fires exhibit instantaneous combustion (T. 935). However, the high carbon monoxide levels of the three children were inconsistent with a gasoline fire and consistent with the defense theory of a flashback. The low carbon monoxide level of Mrs. Berndt was consistent with waking up, seeing a fire, and because of her .25% blood alcohol, saying "Oh my God," walking toward the fire and dying of breathing superheated air.

A neighbor of Skip, Charles Catron, crawled into the house over an area the State said contained gasoline. If so, he would have been severely burned or unable

to enter because of fire. However, he did get in which is inconsistent with the presence of a gasoline fire. Further, he got in to where Brenda was lying which was contrary to the State's experts.

The State theorized that if Skip left the house as he claimed, he would have been injured and he complained of none. However, he did have singed hair on the left side of his body (T. 1054), just like Mr. Catron. Also, his feet turned a terrible brown color and all the skin on the bottom of his feet peeled off (T. 1238, 1253) a few days later.

The State's chemist testified he found gasoline in five of 26 samples taken from Skip's home. The worth of that opinion has been dealt with earlier.

Finally, why would Skip Berndt do this? His wife was working. It would make no sense to kill her and lose the income. There was no evidence the

marriage was in trouble. If he wanted to kill his wife, why would he spread gasoline at the doors of his son's bedrooms and down the stairs. The State theorized he did this to trap them (T. 2257). However, the evidence was that he loved them (T. 1114).

From the day the case was charged to the day Skip Berndt was convicted, the facts and the State's theory didn't add up. They still don't. Appellant respectfully asks this Court to reverse his convictions.

CONCLUSION

For the above stated reasons, Skip Berndt respectfully requests that his convictions be reversed.

Respectfully submitted,

WILLIAM R. KENNEDY
Hennepin County Public Defender

By _____
DAVID KNUTSON
(Atty. Lic. No. 57058)
Assistant Public Defender
Attorneys for Appellant
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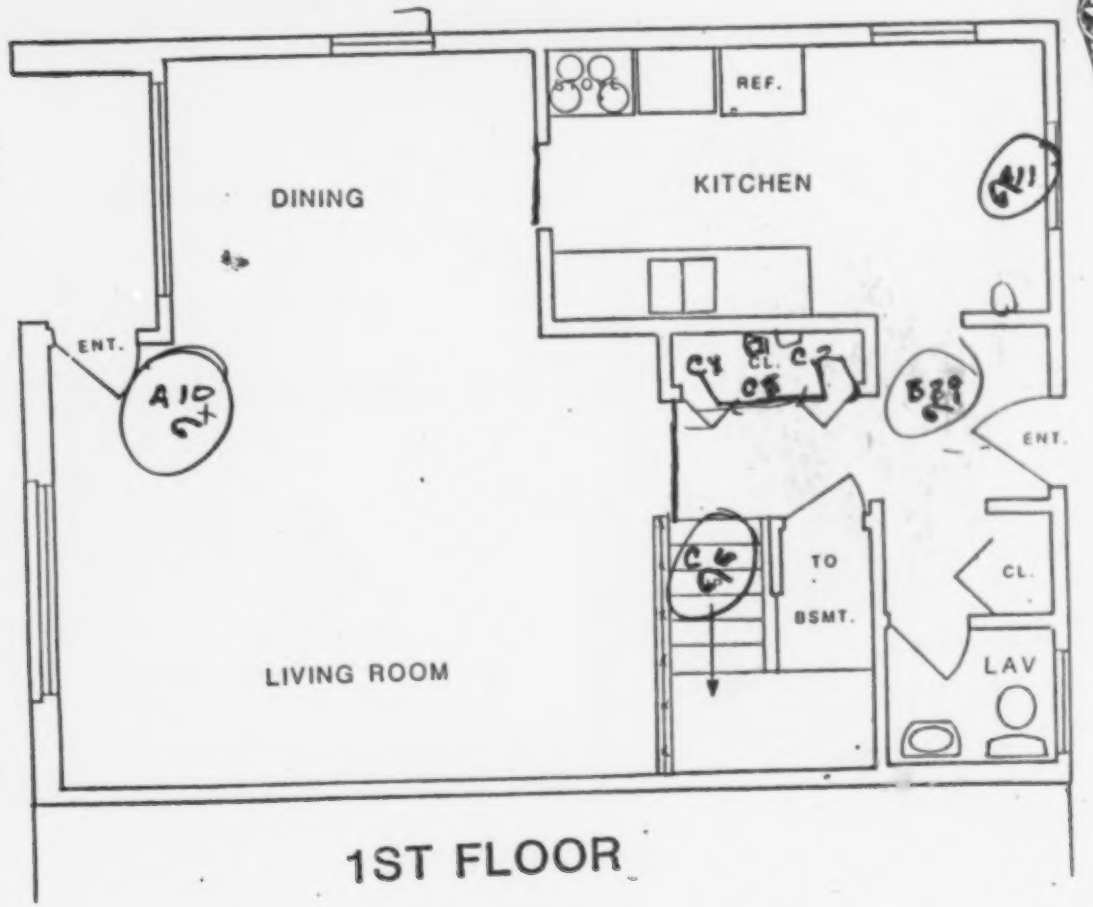
Kevin D. McCary
John C. Mahoney
Law Clerks

DATED: this 30th day of April, 1985.

INDEX TO APPENDIX



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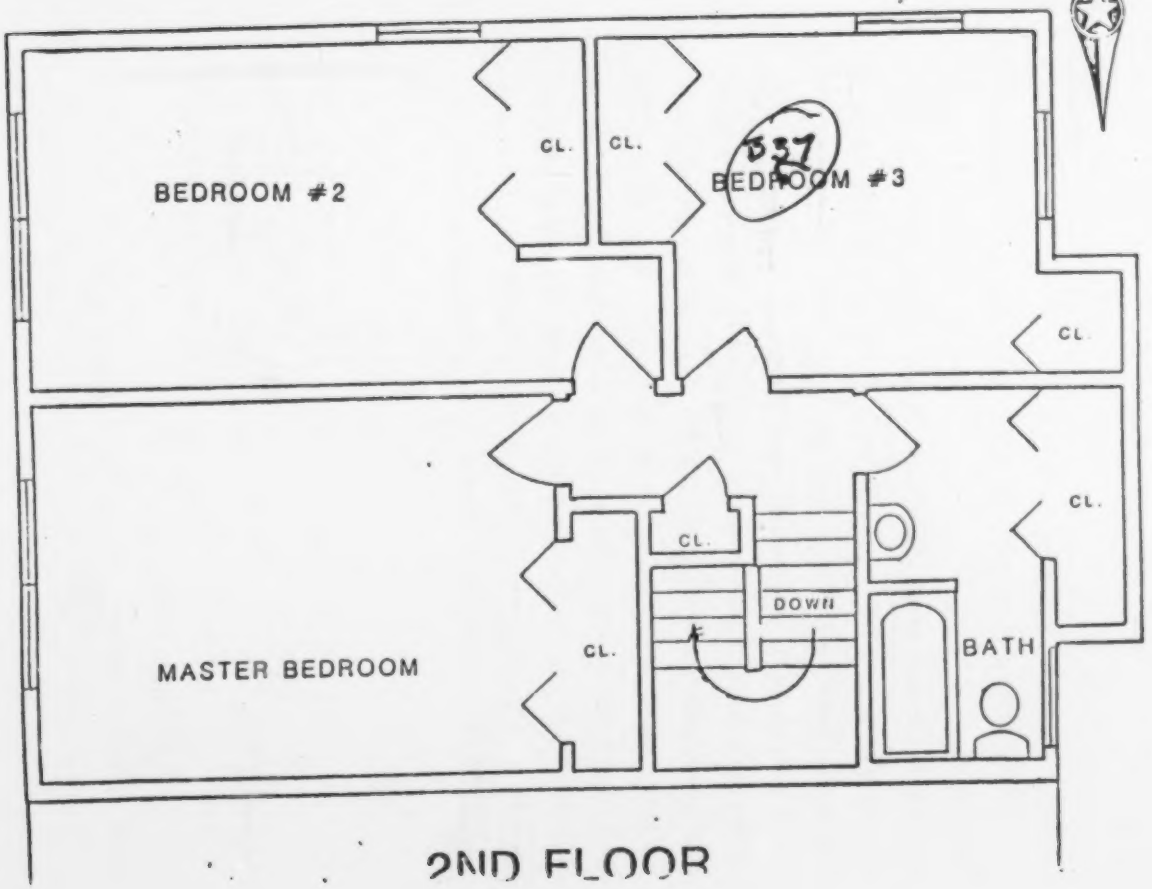
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STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs. — ORDER and MEMORANDUM

Orville Berndt, Jr., — D.C. File: 80973-01

Defendant.

****

The above matter came before the undersigned sitting by special appointment as a District Court Judge for determination of post-trial motion brought on behalf of defendant requesting that the court grant a new trial or order judgment of acquittal pursuant to Minn. R. Crim. P. 26.04(1)(1). Said motion was continued from time to time for the purpose of taking testimony of defense expert Robert Davis and conducting the deposition of state expert Rick Tontarski. All necessary transcripts and memoranda were received by the court by July 24, 1984.

Daniel F. Byrne, Esq. appeared on behalf of the State of Minnesota; Craig Cascarano, Esq. appeared on behalf of the defendant.

Based upon the files, records, depositions, testimony, and written memoranda of both counsel,

IT IS ORDERED:

1. That defendant's motion for a new trial or for judgment of acquittal is denied in its entirety.

2. That the attached memorandum shall be construed as part of this order.

DATED: August 1, 1984

By the Court

Doris Ohlsen Huspeni
Acting District Court
Judge by Special
Appointment

APPENDIX C-2

MEMORANDUM

On November 12, 1983, Orville Berndt, Jr. was convicted after a jury trial on eight counts of first degree murder involving the death of his wife, their son, and his wife's two children by a prior marriage.

The trial lasted several weeks. The State's theory was that Berndt poured gasoline throughout the house, ignited the gasoline, and then went outside. The State claimed that its theory was supported by Orville Berndt's unusual behavior at the time of the fire, by burn patterns in the house, by the rapidity of the fire, and by expert testimony that traces of gasoline were found in some physical samples taken from the fire scene. Defendant's motion relates to this last evidence.

At trial the State's expert, Rick Tontarski, testified extensively that gasoline was found in 5 of 26 samples taken from the fire scene. He reached this conclusion by analyzing all 26 samples in a gas chromatograph which produces a graphic representation of a sample called a chromatogram. By matching the sample chromatograms to standard gasoline chromatograms, Tontarski concluded that gasoline was present in 5 samples. These results were disputed by the defense expert, Robert Davis. Davis indicated that the 5 so-called positive chromatograms in fact did not contain gasoline.

Both Tontarski and Davis testified extensively at trial. Both were extensively cross-examined. On the last day of trial,

Tontarski was recalled for rebuttal testimony. At that time, a State's proposed exhibit (not received) was discovered to be a chromatogram which had not been made available to defendant through discovery. Tontarski had, in fact, made more than one chromatogram for each of the 5 samples in which he had identified gasoline. The additional chromatograms were in his Maryland laboratory. Prior to trial, he had turned over to the defense one chromatogram for each positive sample. Nothing relating to the additional chromatograms was admitted into evidence at trial. Pursuant to a post-trial motion, all positive chromatograms were produced for the defense.

Defendant's motion raises two issues:

1. Whether there was a Rule 9 violation and, if so, would it mandate a new trial.

2. Whether the additional chromatograms are newly discovered evidence that requires a new trial.

1. Reports of examinations and tests are discoverable by the defendant without court order:

> The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of . . . scientific tests, experiments or comparisons made with the particular case.

Minn. R. Crim. P. 9.01(1)(4). Throughout the discovery stage of this case, the defense requested Tontarski to produce only

chromatograms regarding the five positive samples. Discovery of chromatograms taken from the 21 negative samples has never been an issue and is not an issue in this motion. The defense claims that it was unaware that more than one chromatogram was made for each positive sample. Tontarski insists that he informed the defense at some point during discovery that more than one chromatogram existed for each positive sample. Prior to trial, Tontarski turned over to the defense the one chromatogram for each positive sample that he relied upon for making his identification of gasoline. The other positive chromatograms, while of assistance to Tontarski and while reflecting the presence of gasoline, were merely preparatory to insure the right sample volume, select the right amplification setting, or determine the need for clean-up procedures.

Discovery requests between the defense and prosecution were not in writing. Therefore it is difficult to determine whether the discovery request necessarily encompassed all chromatograms showing evidence of gasoline, or only those 5 chromatograms that Tontarski relied on for his opinion. In any event, there was no bad faith on Tontarski's part in not turning over all the chromatograms.

Rule 9 itself is not helpful in determining the extent of Tontarski's obligation to produce, but the principles underlying that rule lend guidance. Discovery is intended to give:

> both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.

State v. Schwantes, 314 N.W.2d 243, 245 (1982). In Schwantes, the court reversed a conviction because the prosecutor failed to disclose evidence it had before trial that was used to impeach the defendant's alibi.

This case is very different. Before trial, the defense was equipped with Tontarski's conclusions and with the underlying information on which he relied. The preliminary chromatograms shed no appreciably brighter light on either his technique or on his ultimate opinions. Unlike Schwantes, any potential surprise here was minimized by keeping the additional chromatograms out of evidence. The prosecutor did not use the information to his advantage. In fact, it was the prosecutor who was responsible for calling the entire matter to the court's attention. Trial preparation was not seriously impeded. The defense was not prejudiced.

Even if Rule 9 were violated, it would not necessitate a new trial, especially since the failure to disclose was in good faith and was nonprejudicial. See, State v. Daniels, 332 N.W.2d 172 (Minn. 1983). To avoid these issues in the future, no doubt the better procedure would be to put requests in writing.

2. To justify a new trial, newly discovered evidence must be of a sort that could not have been discovered before trial by

due diligence and that would materially have affected the outcome of the trial. State v. Meldahl, 310 Minn 136, 245 N.W2d 252 (1976); Minn. R. Crim. P. 26.04(1). The defense arguments do not meet this standard.

At the post-trial hearing, Davis testified that the additional chromatograms showed that Tontarski's technique was unreliable, that Tontarski was operating without standards, that ordinary building compounds were incorrectly considered, and that he believed Tontarski's samples were contaminated. Davis also expressed the concern that the additional chromatograms did not closely resemble the chromatograms that were supplied in pre-trial discovery.

Virtually all of these matters were exhaustively dealt with at trial. The question of standards, specifically a carbon disulphide standard, was explicitly raised at trial. Moreover, at his deposition Tontarski showed that his file on the case in fact contained that standard. Davis' concerns about contamination arose chiefly from the fact that sample containers were punctured to "purge and trap" the contents. He argued that puncturing may have introduced foreign elements into the samples. These punctures were quite noticeable in the containers during trial, so the contamination argument was available to Davis at that time. In any event, Tontarski testified at his deposition regarding the safeguards taken to

protect the integrity of the samples. The fact that Tontarski ran no control samples of building compounds in the house, such as carpeting, also was an issue before the jury. The one concern most directly related to the belated discovery of additional chromatograms was that they did not match the chromatograms which were turned over to the defense before trial. At his deposition, Tontarski explained that this was to be expected since in many instances his equipment was adjusted or the sample was cleaned of impurities to permit more accurate identification. These adjustments and cleansings would change the shape of the graph in each chromatogram.

The post-trial discovery of additional chromatograms provided no significant opportunities for cross-examination of Tontarski that did not exist at trial. Their disclosure before trial would not have made a material difference to the outcome. For these reasons, the defendant's motions are denied.

D.O.H.

APPENDIX C-

PURGE AND TRAP GAS CHROMATOGRAPHY

The purge and trap technique is a method of analysis used to detect the presence of accelerants (primarily petroleum-based products used primarily to promote a fire faster, such as gasoline, kerosene, fuel oil, etc.) in a given material. In purge and trap, the chemist takes the container, in this case an ordinary, unused paint can with a sealed lid, and places a trap tube containing charcoal into the lid. The chemist then punches a hole in the side or bottom of the can and fits a cylinder of carrier gas into it. Both procedures of inserting the trap and the carrier gas, must be done so that outside air does not enter the container. The chemist then turns on the carrier gas, nitrogen or helium or something else that will not interfere with the results of

the chromatogram. The carrier gas is forced through the sample and into the charcoal trap. The hydrocarbons from the can get trapped in the charcoal. It is mandatory that nothing be introduced into the can except the carrier gas. The charcoal trap is then rinsed with a solvent. The solvent will "pick up" the hydrocarbons. The solvent is then injected into a chromatograph. The chemist must know what the solvent is so that its presence can be identified on the resulting chromatogram and ruled out as having come from the same (M.T. 6-9). The hydrocarbons in the sample will apear on the chromatogram. This graphic illustration consists of peaks and valleys. The shape of the peak, and the area contained under the peak, and the time at which the peak appears all assist the chemist in determining the substance represented by those hydrocarbons. In

arriving at that determination, the chemist compares the unknown chromatograms with known chromatograms called standards.

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

ORVILLE BERNDT, JR.,

Defendant.

AFFIDAVIT IN SUPPLEMENT TO RECORD

D.C. File 80973-01
C.A. File No. 82-1950

* * *

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

CRAIG CASCARANO, being first duly sworn, upon oath states as follows:

1. That affiant was trial counsel for the above-named defendant;

2. That affiant requested from the prosecution all the chromatograms which allegedly showed the presence of gasoline;

3. That prior to trial, affiant had at least four telephone conversations with Mr. Richard Tontarski, the State's chemist, the purpose of which was to acquaint affiant with Mr. Tontarski's methodology and scientific conclusions;

4. That affiant asked Mr. Tontarski specific questions concerning the chromatogram and his standards;

5. That affiant, on at least two occasions, asked Mr. Tontarski if affiant had all of the chromatograms that showed the presence of gasoline;

6. That affiant asked Mr. Tontarski, "What, if anything you would surprise me with at trial?";

APPENDIX E-1

7. That Mr. Tontarski said that affiant had all the positive chromatograms and that there would be "no surprises";

8. That Mr. Tontarski never, in any of the conversations, revealed to affiant that there were multiple chromatograms of each sample in which Tontarski believed gasoline was present;

9. That the day the testimony concluded, Robert Davis, the defense chemist, and affiant went to the prosecutor's office to review a proposed exhibit;

10. That the exhibit was an enlargement of a chromatogram that allegedly showed the presence of gasoline;

11. That, in fact, the exhibit was an enlargement of a chromatogram that was never disclosed to affiant;

12. That at the meeting with the prosecuting attorney, the State's chemist, the defense chemist and affiant, neither the State's chemist nor the prosecuting attorney disclosed the existence of additional positive chromatograms;

13. That affiant placed the above-mentioned facts in the trial record on or about November 10, 1983;

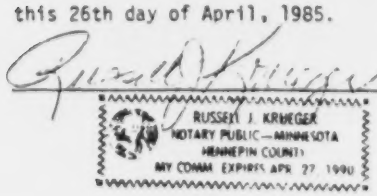
14. That affiant spoke with the court reporter, and was informed that the notes have been misplaced. As a result, the above facts were not in the trial record.

Further affiant saith naught.

Craig D. Cascarano

Craig Cascarano

Subscribed and sworn to before me
this 26th day of April, 1985.



APPENDIX E-2

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

July 10, 1984

Mr. Dan Byrne
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487

Dear Mr. Byrne:

I have read your Memorandum and by this letter request that corrections be made with regard to the facts outlined.

On page 8, you indicate that the disclosure of the preparatory chromatograms was made in the closing stages of the trial. If you recall, the chromatograms were never disclosed until after post-trial motions and orders were signed by the Trial Court. It was only the existence of the additional chromatograms that was disclosed during the rebuttal stage of the trial.

In addition, you indicate on page 6 that absolutely nothing prevented the defense from pursuing, both prior to trial and at trial, that which it now claims to be significant. Again, it is my distinct recollection that there was no knowledge, either on your part or mine, of the existence of the undisclosed chromatograms. It was only learned during the rebuttal stage of the trial of the existence of undisclosed chromatograms. I would ask you to recall not only the surprise, but the astonishment, both on your part and mine, when it was learned that there were existing chromatograms that were not disclosed. If, therefore, there was no knowledge of its existence, clearly the defense could not proceed and investigate that which it now claims would be significant.

On page 9, you indicate that no continuance was sought nor motion made when the existence of preparatory chromatograms became known. Again, it is my distinct recollection, consistent with my notes to the file, that an extensive record was made. It was in-

dicated to the Court that we were two (2) hours from the end of a six week trial, the chromatograms were located in Maryland and not readily available for investigation or review, and therefore the only appropriate motion would be a post-trial motion if there was a conviction. It is also my distinct recollection the Court agreed.

If these corrections are consistent with your recollection, I would ask you to notify Judge Huspeni.

Cordially,

Craig Cascarano
Assistant Public Defender

CC:ls

cc: Judge Huspeni

THOMAS L. JOHNSON
COUNTY ATTORNEY

(612) 348-3091

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

July 23, 1984

Craig Cascarano
Assistant Public Defender
C-2200 Government Center
Minneapolis, Minnesota 55487

RE: Orville Berndt, Jr.

Dear Craig:

After our recent discussion, I thought it appropriate to respond to your letter of July 10th. As to your first point, your suggestion is well taken. It is clear that it was the existence of the preparatory chromatograms that was disclosed in the closing stage of the trial and not the disclosure itself that occurred at that time.

As to your objection to the material on page 6, I can only say that it appears you have misread it. The material in the paragraph to which you object refers back to the preceding paragraph. That is to say, the preceding paragraph referred to page 2 of your memorandum, in which you outlined three areas of interest in your post-trial motion. It is my argument that nothing prevented you from pursuing those areas of interest both prior to trial and at trial. I did not mean to argue that you could have pursued any interest you had in the preparatory chromatograms since it is your position that you were unaware of them. I hope this clarifies that concern.

As to your objection to page 9, I simply say that I found it necessary to discuss as briefly as I did the absence of a motion when the existence of the preparatory chromatograms was known simply because the Lindsey case (State v. Lindsey, 284 N.W.2d 368, Minn. 1979) requires a consideration about a continuance. The Lindsey case cites "the feasibility of rectifying that prejudice by a continuance" as one of the considerations which a trial court must consider in exercising its discretion. I could hardly discuss the Lindsey case and ignore that aspect of it.

Sincerely,

Dan Byrne

DANIEL F. BYRNE
Assistant County Attorney

DFB:br

cc: Honorable Doris Huspeni